IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CONSTELLATION TECHNOLOGIES LLC, *Plaintiff* vs. TIME WARNER CABLE INC. and TIME WARNER CABLE ENTERPRISES LLC, *Defendants*	Civil Action No. 2:13-CV-1079-JRG **JURY TRIAL DEMANDED**
CONSTELLATION TECHNOLOGIES LLC, *Plaintiff* vs. WINDSTREAM HOLDINGS, INC., WINDSTREAM CORPORATION, and WINDSTREAM COMMUNICATIONS, INC., *Defendants*	Civil Action No. 2:13-CV-1080-JRG **JURY TRIAL DEMANDED**

CONSTELLATION'S CONSOLIDATED OPPOSITION TO TIME WARNER CABLE'S AND WINDSTREAM'S MOTIONS TO TRANSFER

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This is a Texas-based patent dispute. Constellation and its parent, Rockstar, inherited a patent portfolio that has been managed, enforced, and licensed from eastern Texas since the mid-1990s.[1] Constellation is headquartered here in EDTX, where relevant documents and witnesses have long resided. TWC has chosen Texas as a focal point for its infringing activity—centering one of TWC's five major regional networks here and actively marketing TWC's infringing services across this District. Windstream's headquarters are right across the border in Arkansas. Windstream offers a suite of infringing services to customers all across Texas, including in this District.

Despite these and other facts demonstrating this suit's deep Texas connections, TWC and Windstream seek a transfer to Delaware. But Defendants' motions fail to find any relevant witness or document in Delaware and neither defendant offers any services in that remote location. Lacking any substantive basis for transfer, Defendants invite legal error by basing their motions on arguments that this Court has found, and the Federal Circuit has confirmed, are not proper considerations.

First and primarily, Defendants base their motions on a procedural gambit: two equipment suppliers of TWC and Windstream and a group of cable company partners, brought three ***second-filed*** cases in the District of Delaware in order to supply TWC and Windstream with a basis for their motion to transfer. Those second-filed suits, all of which expressly rely on the TWC and/or Windstream suits as a basis for jurisdiction, and all of which Rockstar and Constellation are moving to dismiss, are not relevant to a proper transfer analysis. The federal courts do not reward conduct knowingly undertaken to manipulate venue.[2] Further "precedent dictates that motions to transfer venue are not decided on a series of changing facts, but instead should be evaluated based on the situation which existed when suit was filed."[3]

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[1] Within this brief, "Constellation" refers to the Plaintiff, Constellation Technologies LLC. "Rockstar" refers to Rockstar Consortium US LP. "TWC" refers to Time Warner Cable Inc. and Time Warner Cable Enterprises LLC. "Windstream" refers to Windstream Holdings, Inc., Windstream Corporation, and Windstream Communications, Inc. "Constellation Patents" refers to the nine patents collectively asserted against TWC and/or Windstream. And EDTX, of course, refers to the Eastern District of Texas.

[2] Conduct that has been "knowingly undertaken to manipulate venue . . . should not be rewarded." *See MobileMedia Ideas LLC v. HTC Corp.*, No. 2:10-CV-112-JRG, 2012 WL

Second, Defendants argue that Delaware is potentially more convenient as a central location for some subset of the numerous far-flung witnesses discussed in its motion. But that argument, even if it were true, is irrelevant because Defendants have failed to identity ***any*** witness resident in Delaware. "In cases where no potential witnesses are residents of the court's state, favoring the court's location as central to all of the witnesses is improper."[4] By contrast, Constellation and numerous material witnesses reside in and around EDTX—where both TWC and Windstream infringe and the patents have long been licensed, managed, and enforced.

TWC and Windstream are distinct companies. Constellation is filing this combined opposition because TWC and Windstream rely on the same predicate—the fact that they were able to convince their suppliers and cable company partners to bring second-filed suits in the District of Delaware—as the primary basis supporting their transfer motion.

Defendants' motions lack merit. Both cases are properly tried in EDTX and the Court should deny Defendants' motions.

I. FACTUAL BACKGROUND

A. Rockstar Consortium and Constellation

Constellation is a wholly-owned subsidiary of Rockstar, from which Constellation received the Constellation Patents and other services.[5] Rockstar is the successor to a large portion of the intellectual property that resulted from billions of dollars' worth of research and development at Nortel Networks ("Nortel"). When Nortel went bankrupt, several of the most

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1570136, at *2 (E.D. Tex. May 3, 2012) (Gilstrap, J.), *mandamus denied sub nom. In re HTC Corp.*, 494 F. App'x 81, 82 (Fed. Cir. 2012).

[3] *Vertical Computer Sys., Inc. v. LG Electronics MobileComm U.S.A., Inc.*, No. 2:10-CV-490-JRG, 2013 WL 2241947, at *3 (E.D. Tex. May 21, 2013) (Gilstrap, J.) (citing *In re EMC Corp. (EMC II)*, 2013 WL 324154, at *2 (Fed. Cir. Jan. 29, 2013)).

[4] *MobileMedia*, 2012 WL 1570136, at * 7 (denying motion to transfer) (citing *In re Genentech, Inc*., 566 F.3d 1338, 1344 (Fed. Cir. 2009)).

[5] Rockstar provides Constellation with analytical and other services. Powers Decl. ¶ 6.

sophisticated technology companies in the world, including Apple, BlackBerry, Ericsson, Microsoft, and Sony, stepped in to purchase a large portion of the Nortel patent portfolio for $4.5 billion. Those five companies founded Rockstar to own and manage the majority of the patents in that portfolio.

At that time, Nortel maintained its U.S. headquarters at its 800,000-square foot headquarters in Richardson, Texas, including an almost 400,000-square-foot research and development center that it constructed in 1991. Declaration of Donald Powers ("Powers Decl."), ¶ 8. The Nortel group responsible for licensing Nortel's patents was based out of that office, and had been conducting licensing operations from there since the mid-1990s. Powers Decl. ¶ 9. Rockstar hired former Nortel employees from that group and operated out of the Richardson complex until December 2012. *Id.* ¶¶ 14–16. Rockstar then relocated its headquarters to more modern and suitable facilities in Plano, which is in EDTX. *Id.* ¶ 15–16.

B. TWC's Connections to this District

TWC public statements confirm that it has a "long-standing relationship with the State of Texas." Declaration of Zachary Elsea ("Elsea Decl."), Exh. 1. Texas is home to one of five major regional networks provisioned by TWC. Elsea Decl., Exh. 2. Accordingly, TWC has a huge subscriber base in Texas. Approximately one in four television households in Texas subscribes to TWC's services. Elsea Decl., Exh. 3. For example, TWC has over 65,000 subscribers in the EDTX Beaumont-Port Arthur metropolitan region alone. Elsea Decl., Exh. 4. In fact, in 2008, TWC chose to use Beaumont as its trial city for experimenting with different pricing models that it intended to adopt nationwide. Elsea Decl. Exh. 5. Additionally, according to its website, TWC maintains customer service centers and sales offices across the state. Elsea Decl., Exh. 6. Because the Constellation Patents relate to methods and systems, the methods TWC uses to physically implement its systems in Texas are highly relevant to the infringement analysis in this case. TWC does not offer services in Delaware. Elsea Decl., Exh. 7.

C. Windstream's Connections to this District

Windstream is based in Little Rock, Arkansas, adjacent to this district. Windstream offers a suite of infringing services to its customers all across Texas, including in this district. Elsea Decl., Exhs. 8, 9. Windstream has many miles of fiber optic plant in both its fiber backbone and local service areas, with major outlays running through this district. Elsea Decl., Exh. 10. As with TWC, the methods that Windstream uses to implement its systems in Texas, to serve its Texas customers, will be probative to the infringement analysis. Windstream does not allege in its transfer motion that it offers any services in Delaware, nor does it list Delaware as one of the 23 states in which Windstream offers services. Elsea Decl., Exh. 8.

D. This Lawsuit and the Delaware Lawsuits

Constellation filed its patent infringement lawsuits against TWC and Windstream in EDTX on December 11, 2013. Rather than defend on the merits, Defendants decided to work with their equipment suppliers and industry partners to file three lawsuits in the District of Delaware involving the Constellation Patents. Once these lawsuits were filed, TWC and Windstream then moved to transfer to the District of Delaware based on the existence of these suits. Lead counsel for TWC represents each of the plaintiffs in the three Delaware lawsuits. Elsea Decl., Exh. 11.

First, on January 17, 2014, five cable companies, (collectively, the "Cable Company Partners"),[6] sued Rockstar and Constellation for claims that included a request for declaratory judgment of non-infringement on all 4,000 patents that Rockstar inherited from Nortel. The Cable Company Partners however made clear that their true concern and interest is the Constellation Patents.[7] In fact, they openly admit that they filed the lawsuit as a reactive follow-on to the suit that Constellation had filed against TWC a month earlier. Exh. A at ¶¶ 67–68

[6] The Cable Company Partners Charter Communications, Inc., WideOpenWest Finance LLC (a/k/a WOW! Internet, Cable & Phone), Knology Inc., Cequel Communications LLC (d/b/a Suddenlink Communications), and Cable One Inc.

[7] *See Charter Communications et al. v. Rockstar Consortium US LP et al.*, Case No. 1:14-cv-55-SLR (D. Del.) (Cable Partners Complaint attached as Exh. A).

("Constellation's enforcement activities against TWC reflect a manifest intent, on the part of Constellation, to enforce its patent rights against the very communications technologies that are employed in Plaintiffs' businesses . . . . For these reasons . . . Plaintiffs have a sufficient reasonable apprehension that they will face suit.")

Three of the five Cable Company Partners—Charter Communications, Inc., Cequel Communications, and Cable One, Inc.—provide services in Texas. Elsea Decl., Exhs. 12–14. The two that TWC suggests do not offer services in Texas appear to operate as a single company. *See* Exh. A ¶ 16. None of the Cable Company Partners allege that they provide any services in the District of Delaware and none of them allege that they maintain any facilities within the District of Delaware. *See id.* ¶¶ 15–18 (describing the Cable Company Partners with no mention of Delaware operations). Instead, they allege that their systems are the same as TWC's and because of this they want to be involved in the adjudication of the Constellation Patents. *Id.* ¶ 66. ("The technologies accused of infringement in the TWC lawsuit can be characterized as being directed to communications technologies similar to those employed in Plaintiffs' businesses."). They simply do not want to appear before this Court.

On January 30, 2014, ARRIS[8] added its new suit for declaratory judgment of non-infringement, among numerous other claims, against Rockstar and Constellation.[9] ARRIS alleges that it is a TWC supplier. ARRIS does not plead that Rockstar and Constellation have ever had any communications with ARRIS relating to the patents in suit. ARRIS also does not plead that Rockstar and Constellation ever accused ARRIS of infringing the Constellation Patents. ARRIS relies instead on the TWC lawsuit as one of its primary bases for jurisdiction. Exh. B ¶¶ 84, 91–93, 112, 117. ARRIS admits that TWC urged ARRIS to assist TWC in its dispute with Constellation. Exh. B ¶ 93 ("On January 21, 2014, TWC informed ARRIS . . . that

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[8] As used herein, "ARRIS" means ARRIS Group Inc., ARRIS Enterprises Inc., ARRIS Solutions Inc., and General Instrument Corporation.

[9] *See ARRIS Group, Inc. et al. v. Constellation Technologies LLC et al.*, No. 1:14-cv-114-SLR (D. Del) (ARRIS Complaint attached as Exh. B)

Rockstar's December 11, 2013 complaint may 'relate to products purchased by Time Warner Cable from Arris' and asked ARRIS for assistance."). ARRIS does not plead that it has any relevant facilities or offices in the District of Delaware. *See id.* ¶¶ 1–4; 15–37.

The next day, on January 31, Cisco Systems Inc. ("Cisco"), an alleged supplier of TWC and Windstream, filed a massive set of counterclaims involving patents owned by Constellation in a suit that a separate company called Bockstar had previously filed in Delaware.[10] As discussed below, Cisco appended those counterclaims to the unrelated Bockstar suit at the request of TWC and Windstream to create an excuse for transfer out of this district.

Bockstar is a separate Rockstar subsidiary that holds patented technologies that are distinct from the Constellation Patents. Nortel's patent portfolio was deep and broad, with inventions in many different technical categories. Rockstar therefore assigned patents relating to particular technology categories to different subsidiaries. Rockstar created Constellation to focus on technology for telecommunications service providers to deliver cable, telecommunications, and other multimedia services. Rockstar created Bockstar to focus on technology for network and computer components. Thus, unsurprisingly, the patents that Bockstar asserted against Cisco have no common inventors with the patents Constellation asserted against TWC and Windstream. Nor are any of Bockstar's asserted patents in the same family as any of Constellation Patents.

Two data points make clear the distinction between the patents that Bockstar is asserting against Cisco, and the massive integrations of hardware and software, including fiber optic lines, that stretch across communities, states and the nation, that are the subject of Constellation's business, and the law suits against TWC and Windstream. (1) Cisco does not allege that ***any*** of the Cisco devices accused of infringement by Bockstar contribute to or induce infringement of the complex telecommunications services that are the subject of the TWC and Windstream cases; and (2) Cisco's own marketing literature shows that the devices Bockstar has accused of infringement are generic and can be used in industries that have nothing to do with telecommunications. For example, Cisco advertises that Norwegian Cruise Line's largest ship deploys Cisco Catalyst 4500 and 6500 Series switches—both of which are named in Bockstar's Complaint—to connect devices that include not only computers but vending machines and gambling devices.[11] Cisco further boasts that some of those same switches are also used in conjunction with Cal Tech's particle physics detector on the Large Hadron Collider in Switzerland and France.[12]

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[10] *See Bockstar Technologies LLC v. Cisco Systems Inc.*, No. 1:13-cv-02020-SLR (D. Del.) (Cisco Answer and Countercomplaint attached as Exh. C).

Bockstar's suit against Cisco and Constellation's suits against TWC and Windstream were filed on the same day. The suits relate to distinct subject matter and distinct patents. Cisco's attempt to convert the Bockstar suit into an unmanageable "mega-suit" appending unrelated patents not even owned by Bockstar to assist its customers TWC and Windstream is abusive and wholly-improper.

Like ARRIS, Cisco does not plead that it has any facilities or offices relevant to the Constellation Patents in the District of Delaware, nor does it plead that any facilities it maintains proximate to Delaware have any connection to its suit against Constellation. *See* Exh. C, Counterclaims ¶ 1

Like ARRIS, Cisco does not plead that Rockstar and Constellation have ever had any communications with Cisco relating to the patents in suit. Cisco also does not plead that Rockstar and Constellation ever accused Cisco of infringing the Constellation Patents. Cisco relies instead on the TWC and Windstream lawsuits as a basis for jurisdiction. Cisco seeks declaratory judgment of non-infringement on a total of 28 patents, including the nine Constellation Patents, which have never been asserted against Cisco. Like ARRIS, Cisco's

[11] Cruise Operator Leverages Advanced Network for New Ships Case Study, http://www.cisco.com/c/en/us/products/collateral/switches/catalyst-3560-c-series-switches/case_study_c36-709868.html (last visited Mar. 8, 2014).

[12] Accelerating Physics Research with High-Performance Global Networks, http://www.cisco.com/c/en/us/products/collateral/switches/catalyst-6500-series-switches/prod_case_study0900aecd805785d9.html (last visited Mar. 8, 2014).

Complaint admits that it sued Constellation and Rockstar in order to assist TWC and Windstream. Exh. C., Counterclaims ¶ 26. ("TWC informed Cisco that Rockstar's December 11, 2013 complaint related to products purchased by TWC from Cisco and provided notice to Cisco of its request for indemnity."); ¶ 29, 31 ("Each of the Known Accused Customers have asked Cisco for assistance and/or indemnification in response to Rockstar's claims of infringement.").

TWC confirms that ARRIS and Cisco sued in Delaware at TWC's behest. TWC Motion at 6–7 ("To protect the interests of its customers (including TWC), and to resolve the infringement and validity issues once and for all, Cisco and ARRIS filed separate declaratory judgment actions in the District of Delaware."). Windstream also emphasizes that "Cisco specifically identifies this Action [and] Cisco's indemnity obligation to Windstream . . . as bases for its counterclaims." Windstream Reply at 3.

The same law firm represents TWC, Cisco, ARRIS, and the Cable Company Partners. Elsea Decl., Exh. 11. Lead counsel for TWC and the Delaware plaintiffs stated publicly that the TWC lawsuit "belongs in Delaware" and his interview article further explained that "Cisco is hoping to move the whole dispute out of the Eastern District of Texas" by launching "its Delaware counter-attack." Elsea Decl., Exh. 15. After colluding with multiple non-parties to initiate second-filed claims in Delaware, TWC filed its transfer motion, which is largely predicated on the existence of these after-filed claims. Windstream filed its "me too" transfer motion thirteen days later, generally presenting the same arguments as TWC.

What has occurred in the District of Delaware is not complicated. TWC has decided that it does not want to litigate a patent infringement lawsuit in one of the five centers of the United States in which it conducts its business, and in which Constellation and its predecessors have been located since 1991. As a result, it enlisted its industry colleagues and its suppliers to bring a series of dubious claims in the District of Delaware for the express purpose of stripping EDTX of jurisdiction over this dispute. Windstream came to a similar conclusion. Defendants' procedural gamesmanship is wholly inconsistent with the purpose of 28 U.S.C. § 1404(a), and represents a troubling tactic in which collusive behavior among companies replaces the right of plaintiffs to select in the first instance the venue in which a suit can and should proceed. *See Terra Nova Ins. v. 900 Bar*, 887 F.2d 1213, 1225 (3d Cir. 1989) ("[C]ourts look with disapproval upon any attempt to circumvent the laudable purposes of the [Declaratory Judgment] Act, and seek to prevent the use of the declaratory action as a method of procedural fencing, or as a means to provide another forum in a race for res judicata."). If their ploy succeeds as a venue-transfer maneuver, the many district courts will be inundated with follow-on litigations devised to divest patent plaintiffs of their home venue.

II. ARGUMENT

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district court or division where it might have been brought." 28 U.S.C. § 1404(a). But transfer should be denied whenever the movant fails to show that the transferee venue is "clearly more convenient" than the plaintiff's chosen venue. *In re Nintendo Co.*, 589 F.3d 1194, 1197 (Fed. Cir. 2009); *In re Genentech, Inc.*, 566 F.3d 1338, 1342 (Fed. Cir. 2009); *In re TS Tech United States Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008); *In re Volkswagen of America, Inc.*, 545 F.3d 304, 315 (5th Cir. 2008). "The clearly more convenient standard 'places a significant burden on [Defendants] to show good cause for transfer;' a burden that this Court does not take lightly." *Core Wireless Licensing, S.A.R.L. v. Apple, Inc.*, No. 6:12-CV-100 LED-JDL, 2013 WL 682849, at *2 (E.D. Tex. Feb. 22, 2013) (*quoting Volkswagen*, 545 F.3d at 314 n. 10 and citing *Lake Cherokee Hard Drive Technologies, LLC v. Bass Computers, Inc.*, No. 2:10-cv-216, 2012 WL 462956, at *5 (E.D. Tex. Feb. 13, 2012)); *see also Texas Data Co., LLC v. Target Brands, Inc.*, 771 F. Supp. 2d 630, 638–639 (E.D. Tex. 2011).

To determine such issues, the Fifth Circuit has identified several private and public factors with which the Court is well-familiar, and which Constellation addresses below. *See In re TS Tech United States Corp.*, 551 F.3d at 1319 (listing the factors). All factors favor trying these cases in EDTX.

A. Private Interest Factors

1. Convenience of Willing Witnesses

Defendants have not named a ***single witness*** who resides in the District of Delaware. "In cases where no potential witnesses are residents of the court's state, favoring the court's location as central to all of the witnesses is improper." *MobileMedia*, 2012 WL 1570136, at *7 (denying motion to transfer) (citing *Genentech,* 566 F.3d at 1344). Defendants' failure to name a single Delaware resident with material information thus disposes of this factor, which "is probably the single most important factor in a transfer analysis." *Genentech*, 566 F.3d at 1343.

The Fifth Circuit's "100-mile" analysis may provide a heuristic for comparing two districts that each are home to at least *some* witnesses, but it does not apply when one district houses material witnesses and the other houses none.[13] *See, e.g.*, *Genentech*, 566 F.3d at 1344 ("[T]he '100–mile' rule should not be rigidly applied."). Where, as here, a substantial number of material witnesses work or reside within a district, it is legal error to transfer the case to a venue such as Delaware where no witnesses reside, regardless of the supposed convenience of other witnesses located entirely outside of Delaware. *See MobileMedia*, 2012 WL 1570136, at *7 (the witness convenience "factor favors transfer when a substantial number of material witnesses reside in the transferee venue and no witnesses reside in transferor venue ***regardless of whether the transferor venue would be more convenient for all of the witnesses***.") (emphasis added) (internal quotations omitted).

Even if that were not the case, however, EDTX is still a more convenient venue for both party-related and non-party witnesses. Constellation provides examples below.

a) Former Nortel Employees

[13] For this reason, the case relied upon by TWC, *FutureVision.com, LLC. v. Time Warner Cable, Inc.*, No. 6:12-CV-386, 2013 WL 5496810 (E.D. Tex. Apr. 22, 2013), is easily distinguished. In that case, Judge Davis granted TWC's motion to transfer the case to the District of Delaware because there were no witnesses, parties, or documents located in EDTX.

Several former Nortel licensing executives who are not currently employed by Rocktar or Constellation, but nonetheless possess material information, reside in or near EDTX. Art Fisher, Nortel's VP IP Law 1998–2004, resides in the Dallas area. Powers Decl. ¶ 12; Elsea Decl., Exh. 16. Rich Weiss served as Nortel's Deputy IP Counsel from 1997–2008 and works in McKinney (EDTX) and resides in this district. Powers Decl. ¶ 13; Elsea Decl., Exh. 17. These individuals possess detailed knowledge related to Nortel's licensing practices and policies with respect to Nortel's patent portfolio during the years of their employment. Their live testimony will be important because they can speak as to what industries and technologies Nortel's patents, including the Constellation Patents, implicated. They also likely possess detailed knowledge regarding any prior Nortel licenses believed to be relevant to a calculation of damages in this case. TWC's counsel has also stated a clear intent to put in issue Nortel's licensing practices and policies, with respect to the Constellation Patents, in its infringement defenses.[14] Non-party witnesses such as these are least likely to appear at trial voluntarily, and this Court's subpoena power is therefore key to securing their testimony.

Additionally, the Court should note that rather than answer and provide any defenses or counterclaims to Constellation's complaint both TWC and Windstream have filed formulaic motions to dismiss that lack substantial merit. Thus, many more Texas-based witnesses may become relevant to this matter once the Defendants' counterclaims and defenses become known. Though "many . . . witnesses are frequently unknown at this stage of the case,"[15] there is a significant chance that many were based out of Nortel's Richardson, Texas headquarters and have since remained in the area. *See* Powers Decl. ¶ 11.

b) Rockstar and Constellation

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[14] *Cf.* Elsea Decl., Exh. 15 ("'Cisco and Nortel were working and selling products in the same market for decades,' points out Cisco's outside lawyer on the case, John Desmarais. 'They never bothered each other, never sued each other, never threatened each other with infringement. If Nortel really thought those patents were infringed by Cisco, you think something would have been brought up.'").

[15] *Am. Calcar Inc. v. Am. Honda Motor Co., Inc.*, No. 6:05 CV 475, 2006 WL 2792211, at *2 (E.D. Tex. Sept. 26, 2006) (internal citation omitted).

Rockstar is headquartered in this district and it employs a number of individuals who possess material information relevant to this case.

John Garland is President of Constellation Technologies. Declaration of John Garland, ¶ 1. Mr. Garland possesses material information related to Rockstar's and Constellation's licensing efforts and licensing policies. He also possesses material information regarding Rockstar's assignment of the Constellation Patents to Constellation. *Id.* ¶¶ 2–3. Mr. Garland lives in New Jersey but travels frequently due to the nature of his job. *Id.* ¶ 5. Mr. Garland works out of Rockstar's Plano headquarters regularly. *Id*. Conversely, he has no office in Delaware and has not been to Delaware since commencing employment with Rockstar and Constellation. *Id.* ¶ 4. When Mr. Garland is not in the office, he is travelling. His home base is the Plano headquarters.

John Veschi, Rockstar's CEO, was instrumental in the formation of Rockstar and is knowledgeable about all aspects of Rockstar's and Constellation's business. He travels to the Plano headquarters and works out of that office regularly. Declaration of John Veschi, ¶ 2. He has an assigned office in Plano and works closely with his staff there. *Id*. When Mr. Veschi is not in the office, he is travelling. His home base is the Plano headquarters.

Bernie Tiegerman worked with the outside patent prosecution counsel on two of the nine patents-in-suit, and he works full time at Rockstar's Plano headquarters. Declaration of Bernard Tiegerman, ¶ 3. Don Powers also works full-time in the Plano headquarters and has material information related to this suit, including knowledge of Nortel's corporate organization and structure, Rockstar's corporate organization and structure, documents investigated for purposes of this suit and locations of relevant documents, employees, and witnesses, and parties with firsthand knowledge about the patents-in-suit and activities related to those patents. Powers Decl. ¶¶ 1–2. Alfi Guindi is also based out of the Plano headquarters and has material information related to Rockstar and Constellation's IP licensing efforts, including those related to the Constellation patents. Powers Decl. ¶¶ 1–2. Declaration of Alfi S. Guindi, ¶ 2.

Additionally, two Rockstar board members live and work in EDTX or nearby. Kasim

Alfalahi, a Rockstar Board member and Chief IP officer at Ericsson, works across the street from Rockstar's Plano office. Powers Decl. ¶ 25. Randy Mishler, another Rockstar Board member and Senior Director of IP Licensing at BlackBerry, works in nearby Irving, Texas. *Id.* ¶ 26. Mr. Mishler is also a former Nortel patent attorney. *Id*.

Apart from naming these individuals, though, it is important to understand that Rockstar's Plano office is the center of Constellation's and Rockstar's licensing business. Rockstar's regular board meetings are held at Rockstar's Plano office. Powers Decl. ¶¶ 26–27. Its annual strategy sessions, requiring the attendance of nearly all Rockstar employees, are conducted in Plano. *Id.* ¶ 28. Rockstar employees sometimes conduct licensing discussions and negotiations in its Plano office. *Id*. And it is the site of countless other strategy and operational meetings throughout the year. *Id*.

Finally, it is true that the engineers employed by Rockstar Consortium Inc., the Rockstar entity incorporated in Canada, are mostly based in Ottawa, Canada. But to the extent that their testimony is required, Rockstar can fly those employees to its home base in Plano, where office space and remote access to the Rockstar Consortium Inc. electronic files are already available in relatively proximity to the courthouse. Rockstar's Chief Technology officer, Gillian McColgan, periodically works out of the Plano office, and it is much less burdensome for her and the engineers she supervises to work in Plano office rather than Delaware because the Plano office has office space and support facilities, as well as and remote connectivity to the Ottawa facilities. Declaration of Gillian McColgan ("McColgan Decl."), ¶ 3, Powers Decl. ¶ 22. Ms. McColgan and her technical staff, because of their long tenure at Nortel, have important knowledge regarding the patents in a suit and are therefore likely candidates to provide live testimony. (McColgan Decl. ¶¶ 2–3).

c) Patent prosecutors

The attorneys who prosecuted the Constellation patents are likely to have material information related to this case. *See In re Acer Am. Corp.*, 626 F.3d 1252, 1255 (Fed. Cir. 2010) (recognizing prosecuting attorneys as likely witnesses for purposes of § 1404(a)). TWC identified six individuals who prosecuted the patents Constellation has asserted against it. TWC Motion, Exh. 36. Three of them—Bill Lee, Tony Josephson, and Holmes Anderson—have agreed to attend trial in EDTX pending determination of the trial date. *See* Declaration of William M. Lee, Jr.; Declaration of Anthony J. Josephson; Declaration of Holmes Anderson. TWC concedes that a fourth patent attorney resides in Dallas, conveniently close to this district. *See* TWC Motion, Exhs. 36, 47. As for the five patents asserted against Windstream, Bill Lee prosecuted two of them, and Holmes Anderson prosecuted a third. Windstream Motion, Appendix B. The attorneys who prosecuted a significant number of the Constellation Patents are therefore either willing to voluntarily travel to EDTX or are already nearby. None have any connection to Delaware.

d) Named Inventors

Four named inventors on the Constellation Patents, David Mann, Robert Pfeffer,[16] Mike Grant, and Kent Felske, have agreed to travel to EDTX to provide testimony, pending determination of the trial date. *See* Declaration of David Mann; Declaration of Robert Pfeffer; Declaration of Mike Grant; Declaration of Kent Felske. All four agree that Marshall, Texas is a more convenient location for them to offer testimony because of their familiarity with the region and because access to Rockstar's facilities, documents, and personnel outweighs the speculative, marginal difference in travel time. *Id*. All of the other named inventors are, like Messrs. Mann, Pfeffer, Grant, and Felske, are former Nortel employees.

According to Defendants, with the exception of one in Georgia and another in North Carolina, the remaining inventors are either on the west coast of the United States, and therefore closer to Texas than to Delaware, or outside of the country (mostly in Canada) and well out of either court's subpoena power. TWC Motion, Exh. 19; Windstream Motion, Appendix A.

[16] TWC erroneously identified Robert Pfeffer as residing in Hartford, Connecticut. He lives in St. Paul, Minnesota. *See* Declaration of Robert Pfeffer, ¶ 2.

Defendants have offered no evidence that any of those inventors are willing to take time away from their day jobs and fly to Wilmington to participate in trial, but would not be willing to do the same in Marshall. Moreover, even if a Canada resident's testimony is secured via deposition (with the cooperation of Canadian courts), the parties' attorneys would travel to the inventor, not the other way around. The same is true for the inventors located in other areas. EDTX is therefore the more convenient forum for the named inventors.

e) TWC

TWC has identified no relevant witnesses of its own in the District of Delaware; indeed, TWC does not even offer services in that state. Elsea Decl., Exh. 7. As with deficient motions judges of this district have have denied in the past, TWC "fails to identify employees with knowledge of the accused systems, the accused system's marketing, or the accused system's financial details." *Core Wireless*, 2013 WL 682849 at * 4. Also telling is TWC's failure to explain why it cannot secure the testimony of any relevant ARRIS or Cisco witnesses without compulsory process, particularly given TWC's admission that its vendors have committed to assist TWC in litigation. *Cf*. Order Denying Motion to Transfer Venue, *IPVX Patent Holdings, Inc. v. Altigen Comm's, Inc.*, No. 6:11-CV-568-LED-JDL, slip op. at 5 (E.D. Tex. Feb. 11, 2014) (refusing to consider individuals as unwilling witnesses where movant failed to "identify any such witnesses or explain why it could not secure their testimony.").

By contrast, Texas is home to one of five major regional networks provisioned by TWC. Elsea Decl., Exh. 2. Approximately one quarter of all television households in Texas subscribe to TWC. Elsea Decl., Exh. 3. As stated above, TWC has significant subscriber bases in this district, including Marshall, and the Beaumont-Port Arthur metropolitan area. Elsea Decl., Exh. 4. TWC also maintains customer service centers and sales offices across Texas. Elsea Decl., Exh. 6. Constellation therefore anticipates that TWC's initial disclosures or other discovery will reveal the identities of TWC employees within EDTX or its subpoena power who have relevant knowledge of TWC's provision, operation, and maintenance of infringing services in this district.

Moreover, the complaint against TWC accuses services, not pieces of equipment of infringement, and the patents at issue claim methods and systems. First Amended Complaint Against TWC, No. 2:13-CV-1079, Doc. No. 15, ¶¶ 7–10, 28–29, 40–41, 54, 67, 79, 92–93 (describing TWC's infringing services); ¶¶ 27, 39, 53, 65, 78, 91 (discussing the patent claims). In the context of method and system claims, the focus of venue analysis is the locus of where the method and systems are implemented, not where component parts of the method may be manufactured. *See Certusview Technologies, LLC v. S & N Locating Servs., LLC*, No. 2:13CV346, 2013 WL 6571833, at *4 (E.D. Va. Dec. 13, 2013) ("[T]he Court finds that Plaintiff has advanced 'significant ties' to the Eastern District of Virginia . . . . [M]ost notable is the fact that the alleged infringement involves the *use* of a method (and/or apparatus) within the Eastern District of Virginia in order to map underground utility lines *located within Virginia*."). The massive investment in infrastructure and design that results in infringement of the Constellation Patents occurs in this district and in the State of Texas, not in Delaware.

f) Windstream

Windstream concedes that all of its potential employee witnesses are located in Little Rock, Arkansas, and names no witnesses in or around Delaware. Windstream Motion at 7. Little Rock is clearly closer to Marshall than it is to Wilmington. And as in the case of TWC, Windstream is accused of infringing system/method claims based on infrastructure in this district. Complaint Against Windstream, Case No. 2:13-CV-1080, Doc. No. 1, ¶ 10.

g) ARRIS and Cisco

TWC asserts that employees of ARRIS and Cisco, strangers to this litigation, have information that is relevant to this lawsuit. One of ARRIS's 29 offices is located in Horsham, Pennsylvania. Elsea Decl., Exh. 18. TWC states that this office is the former "headquarters of Motorola Home for the development of cable television and broadband hardware and software." TWC Motion at 6–7. ARRIS acquired this office in ***2013***. Elsea Decl., Exh. 19. There is no evidence, however, that TWC received equipment from this recently-acquired Pennsylvania facility for use in the systems at issue in this case, or that any individuals at this facility will need to provide live testimony at trial regarding the function of the massive telecommunications systems TWC constructs in Texas. Therefore, "[d]espite [TWC's] statements to the contrary, there are absolutely no facts before the Court to support a contention that [ARRIS] has documents relevant to *this* lawsuit" in its Horsham, Pennsylvania facility. *See MobileMedia*, 2012 WL 1570136, at *5.

As for Cisco, Defendants mention that company only in passing. This is likely because, to the extent that Cisco's products are or become relevant, Cisco has extensive facilities and employees in and around EDTX. This includes a 30,000 square foot facility, data center, and customer briefing center in Richardson, Texas and an additional data center in Allen, Texas.[17] Cisco has over 1,200 employees in these facilities.[18] Indeed, Cisco often touts its deep and longstanding involvement in the Richardson community.[19]

Defendants have failed to meet their burden of establishing that ARRIS and Cisco possesses any information in Delaware that is relevant to this Texas-based litigation.

2. Relative Ease of Access to the Sources of Proof

"[S]ignificant sources of proof exist within EDTX at least as relates to the Plaintiff," because the documents related to the Constellation Patents are stored at Constellation's Plano headquarters. *InMotion Imagery Technologies, LLC v. Imation Corp.*, No. 2:12-CV-298-JRG, 2013 WL 1279055, at *3 (E.D. Tex. Mar. 26, 2013). Files in Plano include historical Nortel files

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17 Cisco on Cisco: Richardson Data Center Tour, interactive presentation available at https://www.cisco.com/web/about/ciscoitatwork/data_center/flash/dc_experience/rdc_tour.html. (last accessed March 14, 2014); Elsea Decl., Exhs. 20, 21.

18 *See Thomas Swan & Co. Ltd. v. Finisar Corp et al.*, NO. 2:13-cv-178-JRG, 2014 WL 47343, at *3 (E.D. Tex. January 6, 2014) (Gilstrap, J.). In 2000, Cisco acquired Richardson-based IPCell Technologies, which provided software for broadband access networks combining IP and telephony services. Elsea Decl., Exh. 22.

19 Cisco Systems on Richardson, Texas, video available at http://www.youtube.com/watch?v=xR3VDWCdT3M&noredirect=1 (last accessed March 13, 2014).

relating to patent licenses, patent licensing efforts, payment of royalties, and various patent files. Powers Decl. ¶ 23. All internal patent prosecution files for the Constellation Patents are located in the Plano office. *Id*. The Plano office is also equipped to access all electronic records at Rockstar-related locations in Ottawa and Toronto. *Id*. ¶ 22.

With respect to TWC, because Texas is home to one of five major regional networks provisioned by TWC, and because TWC actively markets its infringing services in this district, discovery will reveal physical sources of proof, including documents or physical services, existing in this district.

TWC does not refute this. Instead, TWC makes a strong case that its relevant documents are located ***outside*** the District of Delaware. TWC's documents are apparently spread across the country, in at least New York City, New York, Herndon, Virginia, and Denver, Colorado. TWC Motion at 11. But "the place where the defendant's documents are kept weighs in favor of transfer to ***that location***" not some completely separate location. *Genentech, Inc.*, 566 F.3d at 1345 (Fed. Cir. 2009) (emphasis added and internal citation omitted).

TWC represents that the bulk of its technical documentation concerning the majority of the accused technologies is located in Herndon, Virginia. TWC could conceivably make a principled argument about why this case should be transferred to the Eastern District of Virginia. Declining to do so, it instead argues that this case should be transferred to a district that houses none of its relevant documents. There is no legal basis for such an argument.

Windstream concedes that all relevant documents and sources of proof are located adjacent to this district in neighboring Little Rock, Arkansas. Windstream Motion at 7. Windstream makes no mention of any Windstream operations relevant to this case in Delaware.

Finally, two of Rockstar's equity owners, Blackberry and Ericsson, have their United States headquarters in the Dallas area. Powers Decl. ¶ 15. BlackBerry's United States headquarters is in Irving, Texas, and Ericsson's United States headquarters is in Plano.

3. Availability of Compulsory Process

Defendants do not identify a single third party witness within the District of Delaware's subpoena power. Where most non-party witnesses are "scattered throughout the United States" and overseas, "neither district has absolute subpoena power over all potential non-party witnesses," this factors is at best neutral. *RPost Holdings, Inc. v. StrongMail Systems, Inc.*, 2013 WL 4495119 at *3 (E.D. Tex. Aug. 19, 2013). And where, as here, numerous non-party witnesses reside in or near EDTX, this factor favors keeping the case in this district.

The sole argument proffered by either Defendant is TWC's suggestion that ARRIS's office in Horsham, Pennsylvania is within Delaware's subpoena power. But as explained above, TWC does not explain who or what is relevant at that location. As the Court found in *Core Wireless*, and the Federal Circuit affirmed on mandamus, generalized statements regarding where the defendant "maintains business documents and records relating to research, design, development, marketing and product revenue." *Core Wireless*, 2013 WL 682849, at *1. This principle is equally true when a defendant points to the location where an alleged supplier does business with no description of what may be relevant at that location. *See id.* at *3 (explaining that the court will "decline[] to speculate" in the face of "vague assertions and seemingly unknown relevance" of "potential sources.").

Moreover, even if relevant information or witnesses were located in Horsham, Pennsylvania this certainly does not outweigh the convenience of the nine third party witnesses located in east Texas or who have stated that East Texas is more convenient. This includes two Nortel executives, four inventors, and three patent prosecutors. ARRIS has chosen to assist TWC in its dispute with Constellation, and there is no evidence that TWC cannot procure the attendance of any ARRIS witness at trial. *See IPVX Patent Holdings, Inc. v. Altigen Comm's, Inc.*, No. 6:11-CV-569-LED-JDL, slip op. at 5 (E.D. Tex. Feb. 11, 2014) (refusing to consider individuals as unwilling witnesses where movant failed to "identify any such witnesses or explain why it could not secure their testimony.").

4. Judicial Economy

Defendants are not allowed to engage in reverse forum-shopping by orchestrating events after the filing of a suit to support a motion to transfer. Instead, "[m]otions to transfer venue are to be decided based on 'the situation which existed when suit was instituted.'" *In re EMC Corp.*, 501 F. App'x 973, 976 (Fed. Cir. 2013) (denying a petition to order EDTX to transfer the case); *see also Vertical Computer Sys., Inc. v. LG Electronics MobileComm U.S.A., Inc.*, No. 2:10-CV-490-JRG, 2013 WL 2241947, at *3 (E.D. Tex. May 21, 2013) (Gilstrap, J.) ("[P]recedent dictates that motions to transfer venue are not decided on a series of changing facts, but instead should be evaluated based on the situation which existed when suit was filed.") (citing *In re EMC Corp.*). When Constellation sued Defendants on December 11, 2013, no lawsuits were pending regarding any Constellation Patents. The later-filed Delaware lawsuits upon which Defendants so heavily rely are therefore irrelevant to any venue analysis.

Indeed, in the Defendants' own cited authority, the Federal Circuit rejected the same request Defendants make here—namely, a request to transfer a first-filed infringement lawsuit to a district where a later-filed declaratory judgment lawsuit regarding the same patents was initiated by a non-party against the patent holder. *See In re Volkswagen of Am., Inc.*, 566 F.3d 1349 (Fed. Cir. 2009). Defendants' other cited authorities only illustrate instances where a court has transferred a recently-filed action to a district where related claims were *already* pending. *See, e.g.*, *Ho Keung Tse v. Google, Inc.*, No. 6:12-CV-356, 2012 WL 6497124 (E.D. Tex. Dec. 13, 2012) (transferring case from EDTX to district where claims involving the same patent were *already* pending).

Because this dispositive precedent is fatal to Defendants' motions, TWC and Windstream make a misstatement of fact to the Court, arguing that "the exact same issues of validity and infringement . . . are *already* being litigated in multiple cases pending before a single Judge in the District of Delaware." TWC Motion at 3 (emphasis added); s*ee also* Windstream Motion at 3 ("[T]he technology, claim construction, validity, and infringement as to four out of the five patents in this Action are *already* being litigated in multiple cases pending before a single judge in the District of Delaware.") (emphasis added). But no issues are *already* being decided in

Delaware. Rather, a group of non-parties filed lawsuits against Rockstar and Constellation in Delaware to assist TWC and Windstream, ***after***, and in direct response to, Constellation's suits against TWC and Windstream.

If any of the plaintiffs in Delaware truly believed that their interests were implicated by the lawsuits pending before this Court, the Federal Rules make provision for addressing this, either via a motion to intervene or by filing a related suit before this Court. The decision of TWC and Windstream's suppliers and industry partners to file three suits across the country makes clear that they have no interest in vindicating good faith concerns; instead they have an interest in creating an excuse for TWC and Windstream to attempt to transfer first-filed cases out of the home district of the plaintiff.[20]

TWC and Windstream asked ARRIS and Cisco to generate *new* litigation that they openly describe as "duplicative."[21] Defendants now ask this Court to reward the "inefficiencies"[22] and "wastefulness"[23] that the Defendants created by granting them their choice of forum. Encouraging such gamesmanship would set a very disturbing precedent; conduct that has been "knowingly undertaken to manipulate venue in this case . . . should not be rewarded." *See MobileMedia*, 2012 WL 1570136, at *3 (denying motion to transfer when alleged infringer closed its facilities in EDTX and reincorporated in Washington state after receiving notice of infringement). Likewise, if the Cable Company Partners (or any others in Delaware suits against Constellation) are seriously concerned about the adjudication of the infringement and validity of the Constellation Patents and have any meritorious claims, they are free to bring those claims against Constellation right here in EDTX rather than randomly selecting some other venue that has no connection to the facts or witnesses.

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[20] Constellation is filing Motions to Dismiss each of the Delaware cases because, among other reasons, the cases present no respective justiciable controversies. Those motions are attached hereto as Exhibits. D, E and F.

[21] TWC Motion at 8; Windstream Motion at 1.

[22] TWC Motion at 8.

[23] *Id.* at 9; Windstream Motion at 2.

Finally, even if Defendants were correct that this suit will implicate the "exact same issues" as the Delaware suits, the first-filed rule would apply. "[T]he rule counsels that a later-filed action involving the same controversy should be dismissed, transferred or stayed in favor of the first-filed action." *Trustco Bank v. Automated Transactions LLC*, 933 F. Supp. 2d 668, 670 (D. Del. 2013) (Robinson, J.); *see also Proofpoint, Inc. v. Innova Patent Licensing*, 2011 WL 4915847, at *7 (N.D. Cal. Oct. 7, 2011) (finding it “sensible, more appropriate and more convenient” to decline jurisdiction over non-infringement suit where the same patent was at issue in first-filed EDTX suit, plaintiff's technology was implicated in that suit, and plaintiff could intervene). If Defendants stand by their assertion that these cases both involve the same controversy as the Delaware cases, the law is clear that the Delaware cases should be dismissed or stayed while the claims proceed in this district.[24]

B. Public Interest Factors

1. The Local Interest in Having Local Interests Decided at Home

“[I]f there are significant connections between a particular venue and the events that gave rise to a suit, this factor should be weighed in that venue's favor.” *In re Hoffman–LaRoche Inc.*, 587 F.3d 1333, 1338 (Fed. Cir. 2009). Delaware has absolutely no connection to this case apart from its happening to be the state of incorporation of the parties. The Federal Circuit has granted a petition for mandamus to transfer a case ***out*** of Delaware when, "[a]side from [the defendant's] incorporation in Delaware, that forum ha[d] no ties to the dispute or to *either* party." *In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1224 (Fed. Cir. 2011) (holding that "[t]he defendant's state of incorporation . . . should not be dispositive of the public interest analysis.").

On the other hand, Constellation is headquartered in EDTX, and the entities from which it inherited its assets have operated in east Texas since 1991. Its lawsuit is based on services

[24] TWC claims that two of the five Delaware Cable Partners do not operate services in Texas. TWC Motion at 3. This is irrelevant. Their suit could have been brought against Constellation because Constellation resides in the EDTX. *See* Constellation's First Amended Complaint Against TWC, No. 2:13-CV-1079, Doc. No. 15, ¶¶ 1–2.

Defendants provide in this district that infringe Constellation's Patents. Those patents are the result of research undertaken by a company that maintained its flagship U.S. location in Texas for two decades. Nortel's and Rockstar's licensing efforts for those patents took place about one-quarter mile from the EDTX border. This is the consummate Texas-based dispute.

2. Administrative Difficulties Flowing from Court Congestion

TWC concedes that EDTX "is currently bringing cases to trial approximately nine months before the District of Delaware." TWC Motion at 15. Additionally, although this factor is the most speculative, and cannot alone outweigh other factors, unlike Delaware, EDTX has implemented specialized case management procedures for the efficient handling of patent litigation and the judges have case management schemes that have provided predictability and structure to litigation that can otherwise be unwieldy. This factor weighs against transfer.

3. The Familiarity of the Forum with the Law That Will Govern the Case

This case presents a question of federal law, and all federal judges are presumed to be equally competent in federal question cases. *See Cargill Inc. v. Prudential Ins. Colo. of Am.*, 920 F. Supp. 144, 148 (D. Col. 1996). This factor is neutral.

4. The Avoidance of Unnecessary Problems of Conflict of Law

Constellation is aware of no conflict of law problems that currently exist in this case.

III. CONCLUSION

Defendants can point to no concrete facts that favor transfer. The two bases for their motions—that Delaware is central to assorted non-party witnesses despite not housing any of them, and that coordinating a scheme to file non-party claims in Delaware is a proper basis to change venue—run afoul of Federal Circuit precedent. In contrast, the plaintiff, the accused services, and abundant witnesses and documents, are all found in this district. This case should remain in Texas where the dispute started and where it belongs.

Constellation respectfully requests that this Court deny Defendant's motions, or, in the alternative, allow the parties to engage in limited venue-based discovery to develop the record as to the parties' respective connections to Texas and Delaware.

Respectfully submitted,

/s/ Harry L. Gillam, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on the 19th day of March, 2014, per Local Rule CV-5(a)(3).

/s/ Harry L. Gillam, Jr.
Harry L. Gillam, Jr.